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IFCI Ltd v Archipelago Insurance Ltd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1854–12 OF 2020
NOR BEE ARIFFIN, NORDIN HASSAN AND SEE MEE CHUN JJCA
22 DECEMBER 2021

C *Civil Procedure — Stay of proceedings — Pending arbitration — Respondent requested extension of time to file defence — Whether constituted step taken in proceedings — Whether alternative claim contained arbitration clause — Whether appellate intervention warranted — Arbitration Act 2005 s 10(1)*

D This was the appellant's appeal against the decision of the High Court in allowing the respondent's application for a stay of proceedings pursuant to s 10(1) of the Arbitration Act 2005 ('the Act'). The appellant granted a short-term loan in the sum of INR552,400,000 to Gouttephone Technology Pvt Ltd ('GTPL'). GTPL in turn, assigned all its rights and benefit under a
E promissory note in the value of USD10m to the appellant as security for the loan. As provided under the promissory note, Bishopgate Capital Ltd (the first defendant in the High Court), inter alia, promised to pay the holder of the promissory note the sum of USD10m on its maturity date which was on 19 November 2018. The promissory note was insured by the respondent ('the
F AIL policy'). The policy, among others, provided that the respondent agreed to indemnify the appellant against losses arising from any default of the promissory note. GTPL, however, defaulted the loan. Having failed to remedy the default, GTPL requested the appellant to redeem the promissory note. The redemption process was carried out by the appellant on 10 November 2018,
G but the Bishopgate Capital Ltd failed to make any payment to the appellant in accordance with the terms of the promissory note. The appellant then lodged its claim with the respondent in the sum of INR572,457,085 under the AIL policy to recover the losses. However, the payment sought was not paid by the respondent. On 22 March 2019, the appellant and the respondent executed an
H amicable settlement agreement. The respondent entered this settlement agreement as representative of Bishopgate Capital Ltd. The terms of the settlement agreement provided, inter alia, that Bishopgate Capital Ltd was to pay the appellant INR6,250,000 and INR618,750,000 on two separate dates. Bishopgate Capital Ltd paid INR6,250,000 to the appellant but failed to make
I the payment of INR618,750,000. Consequently, the appellant filed a writ and statement of claim against Bishopgate Capital Ltd and the respondent claiming for: (a) as against Bishopgate Capital Ltd, the balance settlement sum of INR618,750,000; and (b) as against the respondent, the sum of INR572,457,085 being the appellant's insurance policy claim under the AIL

policy or alternatively, the balance settlement sum of INR618,750,000. On 8 January 2020, the respondent entered its appearance in the appellant's suit and at a case management on 16 January 2020, the respondent requested for two extensions of time to file its statement of defence. After filing its statement of defence, the respondent proceeded to serve it on the appellant. The appellant filed its reply to the statement of defence and served it on the respondent accordingly. Eventually, on 11 March 2020, the respondent filed an application to stay proceedings in the appellant's suit and to refer the dispute to arbitration pursuant to s 10(1) of the Act. The application was allowed by the High Court. Hence, the present appeal on the grounds that the respondent had taken steps in the proceedings of the appellant's suit when the respondent requested twice for an extension of time to file the statement of defence and filing as well as serving the statement of defence on the appellant. It was submitted that such steps amounted to a submission to the jurisdiction of the High Court and as such, the respondent was no longer in a position to apply for stay of proceedings under s 10(1) of the Act. The main issue in the appeal pertained to the interpretation of the words 'any other steps in the proceedings' in the Act and whether the respondent had taken any other steps in the proceedings filed by the appellant against it.

Held, allowing the appeal with costs:

(1) The respondent had requested twice for an extension of time to file its statement of defence. This request for an extension of time to file the defence, was a step in the proceedings indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration. Further, the respondent had filed its statement of defence in court and served it on the appellant to which the appellant had also served its reply. This service of pleading by the respondent was clearly a step taken in the proceedings of the appellant's suit and an indication that the respondent elected to proceed with the proceedings in High Court and submit to the jurisdiction of the High Court. Therefore, the respondent had waived its right to refer the dispute to arbitration and its application for stay of proceedings pursuant to s 10(1) of the Act was bereft of any basis (see paras 25–26).

(2) Bishopgate Capital Ltd was not a party to the arbitration clause under the AIL policy. Thus, as the dispute involved a party and a non-party to the arbitration agreement, it was best the dispute be dealt with by the court to avoid split litigation. Apart from that, there was also an alternative claim by the appellant against the respondent which arose from the settlement agreement. This settlement agreement did not contain an arbitration clause for the application of s 10(1) of the Act. As such, stay of proceedings for the alternative claim did not arise. Again, there should not be split litigation in the appellant's suit. The judicial commissioner

had erred in allowing the stay of proceedings pursuant to s 10(1) of the Act which warranted appellate intervention (see paras 33, 35 & 39).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan responden untuk penangguhan prosiding menurut s 10(1) Akta Timbang Tara 2005 ('Akta tersebut'). Perayu telah memberikan pinjaman jangka pendek dalam jumlah INR552,400,000 kepada Gouttephone Technology Pvt Ltd ('GTPL'). GTPL pula, memberikan semua hak dan faedahnya di bawah nota janji hutang untuk nilai USD10 juta kepada perayu sebagai jaminan untuk pinjaman tersebut. Seperti yang diperuntukkan di bawah nota janji hutang, Bishopgate Capital Ltd (defendan pertama di Mahkamah Tinggi), antara lain, berjanji untuk membayar pemegang nota janji hutang berjumlah USD10 juta pada tarikh matangnya iaitu pada 19 November 2018. Nota janji hutang telah diinsuranskan oleh responden ('polisi AIL'). Polisi tersebut, antara lain, mempunyai syarat bahawa responden bersetuju untuk menanggung rugi perayu terhadap kerugian yang timbul daripada sebarang keingkaran nota janji hutang. GTPL, bagaimanapun, gagal membayar pinjaman tersebut. Setelah gagal melunaskan hutang tersebut, GTPL meminta perayu untuk menebus nota janji hutang. Proses penebusan telah dijalankan oleh perayu pada 10 November 2018, tetapi Bishopgate Capital Ltd gagal membuat sebarang pembayaran kepada perayu mengikut terma nota janji hutang. Perayu kemudian mengemukakan tuntutannya kepada responden dalam jumlah INR572,457,085 di bawah polisi AIL untuk mendapatkan semula kerugian. Walau bagaimanapun, bayaran yang diminta tidak dibayar oleh responden. Pada 22 Mac 2019, perayu dan responden memasuki perjanjian penyelesaian. Responden memasuki perjanjian penyelesaian ini sebagai wakil Bishopgate Capital Ltd. Syarat perjanjian penyelesaian yang disediakan, antara lain, bahawa Bishopgate Capital Ltd adalah untuk membayar perayu INR6,250,000 dan INR618,750,000 pada dua tarikh berasingan. Bishopgate Capital Ltd membayar INR6,250,000 kepada perayu tetapi gagal membuat pembayaran INR618,750,000. Oleh itu, perayu telah memfailkan writ dan pernyataan tuntutan terhadap Bishopgate Capital Ltd dan responden yang menuntut: (a) terhadap Bishopgate Capital Ltd, jumlah penyelesaian baki INR618,750,000; dan (b) terhadap responden, jumlah INR572,457,085 adalah tuntutan polisi insurans perayu di bawah polisi AIL atau sebagai alternatif, jumlah penyelesaian baki INR618,750,000. Pada 8 Januari 2020, responden memasuki kehadirannya di dalam saman perayu dan pada pengurusan kes pada 16 Januari 2020, responden memohon dua permohonan lanjutan masa untuk memfailkan penyataan pembelaannya. Selepas memfailkan pernyataan pembelaannya, responden terus menyerahkannya kepada perayu. Perayu memfailkan jawapannya kepada pernyataan pembelaan dan menyerahkan kepada responden. Akhirnya, pada 11 Mac 2020, responden memfailkan permohonan untuk menangguhkan prosiding dalam saman perayu dan merujuk pertikaian tersebut kepada

prosiding timbang tara menurut s 10(1) Akta tersebut. Permohonan tersebut dibenarkan oleh Mahkamah Tinggi. Oleh itu, rayuan ini atas alasan bahawa responden telah mengambil langkah-langkah dalam prosiding saman perayu apabila responden meminta dua kali untuk lanjutan masa untuk memfailkan penyataan pembelaan dan pemfailan serta menyampaikan penyataan pembelaan kepada perayu. Adalah dihujahkan bahawa langkah-langkah tersebut adalah dibawah bidang kuasa Mahkamah Tinggi dan oleh itu, responden tidak lagi berada dalam kedudukan untuk memohon penangguhan prosiding di bawah s 10(1) Akta tersebut. Isu utama dalam rayuan tersebut berkaitan dengan tafsiran perkataan 'apa-apa langkah lain dalam prosiding' dalam Akta dan sama ada responden telah mengambil apa-apa langkah lain dalam prosiding yang difailkan oleh perayu terhadapnya

Diputuskan, membenarkan rayuan dengan kos:

(1) Responden telah memohon dua kali untuk lanjutan masa untuk memfailkan pernyataan pembelaannya. Lanjutan masa untuk memfailkan pembelaan adalah langkah dalam prosiding untuk menyampaikan pernyataan pembelaan dan meninggalkan hak untuk timbang tara. Selanjutnya, responden telah memfailkan pernyataan pembelaannya di mahkamah dan menyerahkannya kepada perayu yang mana perayu juga telah menyerahkan jawapannya. Penyerahan rayuan oleh responden ini jelas merupakan langkah yang diambil dalam prosiding saman perayu dan menunjukkan bahawa responden memilih untuk meneruskan prosiding di Mahkamah Tinggi dan tertakluk kepada bidang kuasa Mahkamah Tinggi. Oleh itu, responden telah mengenepikan haknya untuk merujuk pertikaian tersebut kepada prosiding timbang tara dan permohonannya untuk penangguhan prosiding menurut s 10(1) Akta tersebut adalah tidak berasas (lihat perenggan 25–26).

(2) Bishopgate Capital Ltd bukanlah pihak kepada klausa timbang tara di bawah polisi AIL. Oleh itu, memandangkan pertikaian tersebut melibatkan pihak dan bukan pihak kepada perjanjian timbang tara, adalah lebih baik pertikaian tersebut didengar oleh mahkamah untuk mengelakkan litigasi berasingan. Selain itu, terdapat juga tuntutan alternatif oleh perayu terhadap responden yang timbul daripada perjanjian penyelesaian. Perjanjian penyelesaian ini tidak mengandungi klausa timbang tara untuk permohonan s 10(1) Akta tersebut. Oleh itu, penangguhan prosiding untuk tuntutan alternatif tidak wujud. Sekali lagi, tidak boleh ada litigasi berasingan di dalam saman perayu. Pesuruhjaya kehakiman telah tersilap dalam membenarkan penangguhan prosiding menurut s 10(1) Akta tersebut yang menjamin campur tangan rayuan ini (lihat perenggan 33, 35 & 39).]

Cases referred to

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71, CA (refd)
CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd [2015] 11 MLJ 485, HC (refd)
Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173; [2012] 4 CLJ 445, FC (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265; [2016] 6 CLJ 647, FC (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1; [2019] 7 CLJ 395, FC (refd)
Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn Bhd & Anor [2011] 5 CLJ 40, CA (refd)
Mun Seng Fook v AIG Malaysia Insurance Bhd (formerly known as Chartis Malaysia) [2019] 7 MLJ 59, HC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273; [1981] CLJ 39, FC (refd)
Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (refd)
Usahabina v Annuar bin Yahya [1988] 7 MLJ 691, HC (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634, HC (refd)
Yeo Eng Lam v Infinity Vantage Sdn Bhd [2020] 4 MLJ 835, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 6, 10(1)
Rules of Courts 2012 O 12 r 10, 10(1), 10(2), 10(7), O 18 r 2(1), O 69 r 10

Appeal from: Civil Suit No WA-22NCC-705–12 of 2019 (High Court, Kuala Lumpur)

Vijay Raj (Ng Kar Man with him) (Skrine) for the appellant.
Trevor George De Silva (Wong Leong Hong with him) (The Law Officer of LH Wang) for the respondent.

Nordin Hassan JCA:

[1] This is an appeal against the decision of the High Court in allowing the respondent's application for a stay of proceedings pursuant to s 10(1) of the Arbitration Act 2005 ('the Act'). In the court below, the appellant was the plaintiff, Bishopgate Capital Ltd the first defendant and the respondent was the second defendant. Parties will be referred to as they were at the High Court.

[2] The main issue in the present appeal is fairly straightforward which pertains to the interpretation of the words 'any other steps in the proceedings'

in the Act and whether the second defendant had taken any other steps in the proceedings filed by the plaintiff against it. Consequentially, whether the judicial commissioner was right in her finding that the second defendant has not taken any steps in the proceedings which entitled it to the stay of proceedings under s 10(1) of the Act.

BACKGROUND FACTS

[3] The salient facts in the present appeal are as follows. The plaintiff, a company incorporated in India, granted a short-term loan in the sum of INR552,400,000 to Gouttephone Technology Private Limited ('GPTL'). GPTL in turn, assigned all its rights and benefit under a promissory note in the value of USD10m to the plaintiff as security for the loan.

[4] As provided under the promissory note, the first defendant, inter alia, promised to pay the holder of the promissory note the sum of USD10m on its maturity date which was on 19 November 2018.

[5] The promissory note was insured by the second defendant, a company incorporated in Labuan, pursuant to a credit default risk insurance policy dated 20 November 2017 issued by the second defendant ('the AIL Policy'). The policy, among others, provides that the second defendant agreed to indemnify the plaintiff against losses arising from any default of the promissory note.

[6] Thereafter, GTPL was in default of the loan resulting in the plaintiff issuing a notice for event of default to GTPL on 18 October 2018. Having failed to remedy the default, GTPL requested the plaintiff to redeem the promissory note. The redemption process was carried out by the plaintiff on 10 November 2018 but the first defendant failed to make any payment to the plaintiff in accordance with the terms of the promissory note.

[7] The plaintiff then lodged its claim with the second defendant on 22 November 2018 in the sum of INR572,457,085 under the AIL Policy to recover losses it incurred arising from the first defendant's default. However, the payment sought has not been paid by the second defendant.

[8] On 22 March 2019, the plaintiff and the second defendant executed an amicable settlement agreement. The second defendant entered this settlement agreement as representative of the first defendant. The terms of the settlement agreement provides, inter alia: (a) that the first defendant was to pay the plaintiff INR6,250,000 on or before 31 March 2019; and (b) INR618,750,000 on or before 31 May 2019.

[9] Pursuant to the settlement agreement, on 2 April 2019, the first defendant paid INR6,250,000 to the plaintiff but failed to make the payment of INR618,750,000 as agreed in the agreement.

[10] Consequently, the plaintiff filed a writ and statement of claim against the first and the second defendants claiming the following:

(a) as against the first defendant, the balance settlement sum of INR618,750,000; and

(b) as against the second defendant, the sum of INR572,457,085 being the plaintiff's insurance policy claim under the AIL Policy or alternatively, the balance settlement sum of INR618,750,000.

[11] On 8 January 2020, the second defendant entered its appearance in the plaintiff suit and at a case management on 16 January 2020, counsel for the second defendant requested for an extension of time to file the statement of defence until 7 February 2020. Further extension of time was requested by the second defendant until 10 February 2020.

[12] Thereafter, on 10 February 2020, the second defendant filed its statement of defence and served it on the plaintiff. The plaintiff then filed its reply to the statement of defence and served it on the second defendant on 5 March 2020.

[13] Eventually, on 11 March 2020, the second defendant filed an application to stay proceedings in the plaintiff's suit and to refer the dispute to arbitration pursuant to s 10(1) of the Act. The application was allowed by the High Court on 5 November 2020 and hence the present appeal.

THE APPEAL

[14] In the present appeal, the plaintiff's main contention essentially was that the second defendant had taken steps in the proceedings of the plaintiff's suit when the second defendant requested twice for an extension of time to file the statement of defence and filing as well as serving the statement of defence on the plaintiff. It was submitted that such steps amount to a submission to the jurisdiction of the High Court and as such, the second defendant was no longer in a position to apply for stay of proceedings under s 10(1) of the Act.

[15] Conversely, counsel for the second defendant submitted in essence, that the request for extension of time to file the statement of defence and the filing of the same cannot be regarded as taking steps in the proceedings as envisaged under s 10(1) of the Act. It was the second defendant's contention and agreed by the judicial commissioner that the request for extension of time to file the

statement of defence and its filing were merely to preserve the position so that judgement in default will not be entered against the second defendant.

[16] In determining the issue at hand, the main statutory provision for consideration is s 10(1) of the Act which states:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement *shall*, where a party makes an application *before taking any other steps in the proceedings*, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Emphasis added.)

[17] The usage of the word 'shall' in this provision clearly dictates its mandatory application in comparison with the previous s 6 of the repealed Arbitration Act 1952 which used the word 'may' indicating the discretionary power of the court. Section 6 stated:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, *before taking any other steps in the proceedings*, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, *may* make an order staying the proceedings. (Emphasis added.)

[18] Coming back to s 10(1) of the Act, reading its clear wordings, the requirements for its application are, firstly, there is an arbitration agreement between parties involved and secondly, the application for stay of proceedings must be made before taking any other steps in the proceedings. The exemption for the application of this provision is that the agreement is null and void, inoperative or incapable of being performed.

[19] In the present case, the AIL Policy contained an arbitration clause which states:

> 5.5.1 any disputes, controversy arising out of or relating to the AIL Policy, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration.

[20] In any event, the existence of this arbitration agreement is undisputed by the parties. The only issue here is whether the second defendant has taken any other steps in the proceedings in the plaintiff's suit as envisaged under s 10(1) of the Act.

[21] In dealing with the issue as to what constitute 'any other steps to the proceedings', it is instructive to make reference to the often-quoted Federal Court case of *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 at p 638, where it was succinctly explained as follows:

> ... Therefore, the legal position in Malaysia may be neatly summarized as follows:
>
> (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
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> (b) *if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration; and*
>
> (c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), *the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration.* (Emphasis added.)

[22] Further, the Federal Court in the same case, in discussing the High Court case of *Usahabina v Annuar bin Yahya* [1988] 7 MLJ 691 opined that the act of requesting for an extension of time to file the statement of defence is a step taken in the proceedings. At p 631 of the case, this is what Mohtar Abdullah FCJ has to say:

> ... At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. *Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration* (see *Ford's Hotel Company, Limited Appellants; and Bartlett Respondent* [1896] AC 1)(Emphasis added.)

[23] The decision in *Sanwell Corp* on this issue was followed by the High Court, inter alia in: (a) *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634; (b) *CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd* [2015] 11 MLJ 485; and *Mun Seng Fook v AIG Malaysia Insurance Bhd (formerly known as Chartis Malaysia)* [2019] 7 MLJ 59.

[24] In *Winsin Enterprise*, Mary Lim J (as Her Ladyship was, now FCJ) said this:

> [17] *From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff's 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact, I am inclined to go further to say that because of the language deployed in s 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.* (Emphasis added.)

[25] Reverting to the present case, the second defendant had requested twice for an extension of time to file its statement of defence. This request for an extension of time to file the defence, as was held by the Federal Court in *Sanwell Corp*, is a step in the proceedings indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration.

[26] Further, the second defendant has filed its statement of defence in court and served it on the plaintiff to which the plaintiff had also served its reply. This service of pleading by the second defendant is clearly a step taken in the proceedings of the plaintiff's suit and an indication that the second defendant elected to proceed with the proceedings in High Court and submit to the jurisdiction of the High Court. Therefore, the second defendant has waived its right to refer the dispute to arbitration and its application for stay of proceedings pursuant to s 10(1) of the Act is bereft of any basis.

[27] This court in *Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn. Bhd. & Anor* [2011] 5 CLJ 40 reiterated the principle enunciated in *Sanwell Corp* and held as follows:

> [37] On learned counsel's submission that the defendants had to file their statement of defence because of the claim in respect of the supply agreement which contained no arbitration clause, *it is trite law that if a defendant has served any pleadings, then he has clearly taken a step in the proceedings and has thereby elected to proceed with the proceedings in court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration* (see *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213). (Emphasis added.)

[28] On the same issue, the second defendant submitted that there was an express reservation of its rights to arbitration in its statement of defence and its filing of the same was merely to avoid judgment in default being entered against it.

[29] With regards to the second defendant's contention on the reservation of rights to refer the dispute to arbitration, the facts show that when the second

A defendant sought the extension of time to file the statement of defence, the second defendant did not mention its intention to refer the dispute to arbitration pursuant to the arbitration clause in the AIL Policy. The application for stay of proceedings was only made six days after the plaintiff has served its reply to the second defendant's statement of defence. This cannot be said a
B prompt action by the second defendant or a clear indication to refer the matter to arbitration. Furthermore, the express reservation in the statement of defence does not discard or dilute the requirement under s 10(1) of the Act that the application for stay of proceedings must be made before taking any other steps in the proceedings.
C

[30] In *Yeo Eng Lam v Infinity Vantage Sdn Bhd* [2020] 4 MLJ 835, this court had decided that the defendant had taken steps in the proceedings when filing an application to disqualify the plaintiff's solicitor and filing the statement of
D defence and its counterclaim, although the defendant has made an express reservation to refer the matter to arbitration in its statement of defence.

[31] In this regard, we agree with counsel for the plaintiff that the judicial commissioner fell into error in distinguishing *Yeo Eng Lam* case merely because
E two steps had been taken in the proceedings by the defendant in that case. Perusing the authorities alluded to earlier, the number of steps taken is immaterial as the pertinent consideration is whether there is any other steps taken in the proceedings as envisaged under s 10(1) of the Act. In any event, in the present case, we find the first step in the proceedings taken by the second
F defendant was the request for an extension of time to file the statement of defence and secondly, the filing and the serving of the same on the plaintiff.

[32] The wordings of s 10(1) is plain and unambiguous, inter alia, that the application for stay of proceedings must be made before taking any other steps
G in the proceedings. As such, it must be given their natural and ordinary meanings (see: *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445(FC) and *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ 39 (FC)) It is also trite law that a court should not read words into an act of parliament unless there is clear reason for
H it found within the Act itself (see: *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647 (FC), *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 (SC)).

[33] The other important issue in this appeal is that the first defendant in the
I plaintiff's suit is not a party to the arbitration clause under the AIL Policy. Thus, as the dispute involves a party and a non-party to the arbitration agreement, we agree with the plaintiff's contention that in the circumstances, it is best the dispute be dealt with by the court to avoid split litigation as explained by the Federal Court in *Jaya Sudhir a/l Jayaram v Nautical Supreme*

Sdn Bhd & Ors [2019] 5 MLJ 1; [2019] 7 CLJ 395 in the following words:

> [59] We shall next focus on the argument with respect to multiplicity of proceedings and risk of inconsistent findings. The Court of Appeal held that the issue of multiplicity of proceedings and possibility of inconsistent findings as expounded in *Bina Jati*, are no longer material factors to oust the jurisdiction of an arbitrator under Act 646 in view of the decision in *J Jarvis*. The High Court in *J Jarvis*, we apprehend, said that all of those observations relating to concurrent proceedings and the risk of inconsistent findings were true but it was an inevitable consequence of the mandatory language of s 9 of the UK Arbitration Act 1996 that from time to time there would be concurrent proceedings in court and before an arbitrator. The decision of the Court of Appeal in the instant action, in our view, effectively sets to naught the principles laid down by the same court in the case of *Bina Jati* and as affirmed by the Federal Court in the case of *Chase Perdana Bhd v Pekeliling Triangle Sdn Bhd & Anor* [2007] 7 MLJ 677; [2008] CLJ 313 that *where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court and that disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court. In short, what the Court of Appeal and the Federal Court in both cases are trying to emphasise is that the risks inherent in split litigation ought to be avoided.* (Emphasis added.)

[34] In *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71, this court, on the same issue said this:

> *Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.*
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> In *Oxford Shipping Co Ltd v Nippon Yusen Kaisha; The Eastern Saga* [1984] 3 All ER 835, the court held:
>
> Since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement. *In the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to arbitration under the agreement be heard or determined with another dispute involving a stranger which has been referred to arbitration under a different agreement, even though the two disputes are closely related and a consolidated hearing would be convenient* (see also *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 at p 561 (CA); *The 'Vimeira'; Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66 at p 75).
>
> *Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court* (Emphasis added.)

[35] Apart from this, there is also an alternative claim by the plaintiff against the second defendant which arose from the settlement agreement. This settlement agreement does not contain an arbitration clause for the application of s 10(1) of the Act. As such, stay of proceedings for the alternative claim does not arise. Again, there should not be split litigation in the plaintiff's suit.

[36] For completeness, the plaintiff has made reference to O 12 r 10(7) of the

Rules of Courts 2012 and submitted that under this provision the 14 days period under O 18 r 2(1) to file the statement of defence becomes suspended and is reinstated only if the application for stay of proceedings is dismissed. Thus, the 14 days period to file the statement of defence only commences form the date of such dismissal. As such the issue of judgment in default for not filing the statement of defence prior to the application for stay of proceedings does not arise.

Order 12 r 10(7) states:

> Order 18, rule 2(1) does not apply to any defendant making an application under paragraph (1) or (2), unless the application is dismissed and in which case, the defendant shall serve his defence within fourteen days after the dismissal of the application or within such other period as the court may order.

[37] In this regard, we are of the view that O 12 r 10(7) has no application in the present case as the second defendant's application for stay of proceedings was not made under O 12 r 10 para 10(1) or 10(2) but instead under s 10 (1) of the Act and O 69 r 10 of the Rules of Courts 2012.

[38] Be that as it may, as discussed earlier, we are of the view that the second defendant had taken steps in the proceedings of the plaintiff's suit which disentitled it for the stay of proceedings.

CONCLUSION

[39] In conclusion, based on the abovementioned reasons, we were of the view that the judicial commissioner had erred in allowing the stay of proceedings pursuant to s 10(1) of the Act which warrant appellate intervention. In the circumstances, we unanimously allowed the appeal and set aside the decision of the High Court. We also ordered costs of RM15,000 to be paid by the second defendant to the plaintiff subject to payment of the allocator fee.

Appeal allowed with costs.

Reported by K Selvaraju